U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF N-K-M-

DATE: JAN. 4, 2016

CERTIFICATION OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a physician, seeks classification as a member of the professions holding an advanced degree. *See* Immigration and Nationality Act (the Act) § 203(b)(2), 8 U.S.C. § 1153(b)(2). The Director, Texas Service Center, approved the petition. The matter is now before us on certification. The Director's decision will be affirmed and the petition will be approved.

The Director found that the Petitioner qualifies for classification as a member of the professions holding an advanced degree and that a waiver of a job offer would be in the national interest because the Petitioner seeks to practice medicine in a medically underserved area. On certification, the Petitioner submits information concerning the practice of osteopathic medicine in the United States.

I. LAW

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) Subject to clause (ii), the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

> (ii) The Attorney General shall grant a national interest waiver pursuant to clause (i) on behalf of any alien physician with respect to whom a petition for preference classification has been filed under subparagraph (A) if –
>
> (I) (aa) the alien physician agrees to work full time as a physician in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals or at a health care facility under the jurisdiction of the Secretary of Veterans Affairs; and
>
> (bb) a Federal agency or a department of public health in any State has previously determined that the alien physician's work in such an area or at such facility was in the public interest.

The regulation at 8 C.F.R. § 204.12(c)(4) requires the physician to establish that he meets the admissibility requirements under section 212(a)(5)(B) of the Act, which states:

> Unqualified physicians. – An alien who is a graduate of a medical school not accredited by a body or bodies approved for the purpose by the Secretary of Education . . . is inadmissible, unless the alien (i) has passed parts I and II of the National Board of Medical Examiners Examination [NBMEE] (or an equivalent examination as determined by the Secretary of Health and Human Services) and (ii) is competent in oral and written English. For purposes of the previous sentence, an alien who is a graduate of a medical school shall be considered to have passed parts I and II of the National Board of Medical Examiners if the alien was fully and permanently licensed to practice medicine in a State on January 9, 1978, and was practicing medicine in a State on that date.

II. ELIGIBILITY FOR THE VISA CLASSIFICATION SOUGHT

The Petitioner graduated from [redacted] on May 24, 2009, and received his Doctor of Osteopathic Medicine degree. Accordingly, the Petitioner qualifies as a member of the professions holding an advanced degree. The remaining issue is whether a waiver of a job offer would be in the national interest based on the Petitioner practicing medicine in medically underserved areas. Section 203(b)(2)(B)(ii) of the Act provides a national interest waiver for certain physicians who agree to work in an area designated by the Secretary of Health and Human Services as having a shortage of health care professionals or at a health care facility under the jurisdiction of the Secretary of Veterans Affairs. The waiver is limited to certain physicians who follow specific requirements set forth in the regulation at 8 C.F.R. § 204.12.

III. FACTS

The Petitioner filed the Form I-140, Immigrant Petitioner for Alien Worker, on September 5, 2014. The submitted documentation included a May 2012 employment agreement with [redacted] indicating that the Petitioner would provide services as a "Pediatric Hospitalist" physician

for a period of three years. In addition, the Petitioner provided pay statements reflecting his employment with and an April 2014 letter from the president of stating that the Petitioner has worked for the company full-time since July 2012. The record also included a May 2014 letter from the Florida Department of Health (FDH) indicating that the Petitioner's employment as a pediatric physician with "is within a designated low income primary care health professional shortage area" and that the FDH finds the Petitioner's work "to be in the public interest." Furthermore, the Petitioner submitted information from the U.S. Department of Health and Human Services (HHS) showing that the hospital where he practiced in was within a health professional shortage area.

The documentation provided also included an August 2015 letter from Pediatric Program Director at stating that the Petitioner completed his pediatric residency at from June 2009 through June 2012. In addition, the Petitioner submitted a copy of his Pediatric Residency Certification from and copies of his Form W-2, Wage and Tax Statements, demonstrating his employment with from 2009 through 2012. The record also included documentation from HHS reflecting that was in a primary care health professional shortage area. Lastly, the Petitioner provided a letter from the FDH stating that his medical service as a pediatric resident was in a HHS-designated health professional shortage area and was in the public interest.

IV. ISSUES AND ANALYSIS

A. Is graduation from an accredited medical school sufficient, or must the individual have passed parts I and II of the NBMEE (or equivalent licensing exam)?

The Director's decision indicated that there appears to be a conflict between the governing laws and regulations and the Memorandum from Michael Aytes, USCIS, HQ 70/6.2, *Interim guidance for adjudicating national interest waiver (NIW) petitions and related adjustment applications for physicians serving in medically underserved areas in light of Schneider v. Chertoff*, 450 F.3d 944 (9th Cir. 2006) ("Schneider decision") (January 23, 2007), http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/schneiderintrm012307.pdf. As previously mentioned, the regulation at 8 C.F.R. § 204.12(c)(4) requires the physician to establish that he meets the admissibility requirements under section 212(a)(5)(B) of the Act, which states that an individual who is a graduate of a medical school not accredited by a body or bodies approved for the purpose by the Secretary of Education is inadmissible, unless he or she (i) has passed parts I and II of the NBMEE (or an equivalent examination as determined by the Secretary of HHS) and (ii) is competent in oral and written English.

In addition, section IX of the January 2007 Aytes memorandum updating the Adjudicator's Field Manual (AFM) stated:

> Admissibility Requirements Established by Section 212(a)(5)(B) of the Act. The physician must meet the admissibility requirements established by section 212(a)(5)(B) of the Act, relating to examinations that immigrant physicians must pass

> in order to immigrate. Evidence must be provided that the physician has passed parts I and II of the [NBMEE] or an equivalent examination as determined by the Secretary of [HHS], and evidence that the beneficiary is competent in oral and written English.

Chapter 22.2(j)(6)(F)(iv) of the AFM, which incorporates the Aytes memorandum, while not specifically identifying an exception to the examination and English competency requirements, unmistakably states that the physician must meet the admissibility requirements established by the Act. The plain language of section 212(a)(5)(B) of the Act indicates that requirements (i) and (ii) are applicable only if the physician graduated from a medical school that was not accredited by an organization approved by the U.S. Secretary of Education. Therefore, we do not find a conflict between the AFM, the regulations, and the Act. Under current guidance, the physician must graduate from a medical school accredited by an organization approved by the Secretary of Education. If the physician cannot show this, then the physician must demonstrate that he or she has passed parts I and II of the NBMEE, or an equivalent examination as determined by the Secretary of Education, and that he or she is competent in oral and written English. Accordingly, a physician whose medical school was accredited by an organization approved for that purpose by the U.S. Secretary of Education at the time of his or her graduation is not subject to provisions (i) and (ii) under section 212(a)(5)(B) of the Act, and thus satisfies the regulation at 8 C.F.R. § 204.12(c)(4).

B. Are Doctors of Osteopathy eligible for a national interest waiver?

The regulation at 8 C.F.R. § 204.12(a) provides that "[a]ny alien physician (namely doctors of medicine and doctors of osteopathy)" may file a petition seeking a national interest waiver. Outside of the immigration regulations, several other expert sources use a similar definition for the term "physician." For example, the U.S. Department of Health and Human Services (HHS) defines a physician as "a doctor of medicine or osteopathy." 45 C.F.R. § 60.3 (2015). The U.S. Department of Labor's (DOL) *Occupational Outlook Handbook* (*Handbook*) reports that there are two types of physicians: medical doctors and doctors of osteopathic medicine.[1] Lastly, the American Medical Association describes the term physician as a doctor of medicine or doctor of osteopathy.[2]

With regard to this issue, the Director's decision stated:

> After an exhaustive review of all known United States organizations concerning osteopathic medical schools, no organization appears on the surface to have been approved by the Secretary of Education for the purpose of establishing admissibility

[1] While it is not a binding or exclusive resource, the *Handbook* is an expert and persuasive source of information on the duties and educational requirements of a range of occupations. The *Handbook* is available on the Internet at http://www.stats.bls.gov/oco/. U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Physicians and Surgeons, on the Internet at http://www.bls.gov/ooh/healthcare/physicians-and-surgeons.htm#tab-2 (last visited December 17, 2015).

[2] *See* the American Medical Association (AMA) website, http://www.ama-assn.org/ama (last visited December 17, 2015).

> under INA § 212(a)(5)(B), although the American Osteopathic Association has accredited several osteopathic medical schools for the purpose of State licensure requirements to practice osteopathic medicine in the United States. Additionally, after an exhaustive review of all known United States organizations concerning osteopathic licensing examinations, no osteopathic licensing examination appears on the surface to have been determined by HHS to be an equivalent examination to NBMEE for the purpose of establishing admissibility under INA § 212(a)(5)(B). In essence, all known licensing examinations and medical schools leading to a doctor of osteopathy degree or licensing as a doctor of osteopathic medicine are categorically barred under INA § 212(a)(5)(B).

The Director's decision noted that the regulation at 8 C.F.R. § 204.12(a) specifically includes "doctors of osteopathy" as eligible for the national interest waiver. However, the decision stated that there is no known accrediting organization for osteopathic medical schools that has been recognized by the U.S. Secretary of Education, thus barring all doctor of osteopathy physicians from receiving a national interest waiver and hindering the legislative goal of permitting qualified osteopathic physicians to obtain visas under the classification sought.

According to the U.S. Department of Education's website, the Secretary of Education has recognized the American Osteopathic Association (AOA) as the accrediting organization for osteopathic medical programs. *See* http://www2.ed.gov/admins/finaid/accred/accreditation_pg7.html, accessed on November 30, 2015, copy incorporated into the record of proceedings. In the present matter, the Petitioner submitted documentation from the AOA identifying [redacted] as an accredited osteopathic medical school. In addition, the AOA Commission on Osteopathic Accreditation lists [redacted] as having been accredited since the 1980s. *See* http://www.osteopathic.org/inside-aoa/accreditation/predoctoral%20accreditation/Documents/current-list-of-colleges-of-osteopathic-medicine.pdf, accessed on December 17, 2015, copy incorporated into the record of proceedings. Therefore, at the time of the Petitioner's graduation on May 24, 2009, [redacted] had AOA accreditation.

Furthermore, the National Board of Medical Examiners is responsible for licensing examinations for graduates of accredited medical programs and accredited osteopathic medical programs, both of whom may take the U.S. Medical Licensing Examination (USMLE).[3] *See* http://www.nbme.org/students/licensing.html, accessed on November 30, 2015, copy incorporated into the record of proceedings. Accordingly, the Director's decision is incorrect in stating that there is no accrediting organization approved by the Secretary of Education for osteopathic medical schools and no recognized examination for doctors of osteopathic medicine. Even if USCIS determined that an accredited osteopathic medicine program is not an accredited "medical school" for the purposes of admissibility under section 212(a)(5)(B) of the Act, a physician who is a doctor of osteopathy would

[3] Chapter 22.2(j)(6)(F)(iv) of the AFM states that the USMLE is currently recognized as an equivalent exam to parts I and II of the NBMEE.

still be admissible assuming he or she has passed the USMLE and is competent in oral and written English.

V. CONCLUSION

The Petitioner is a graduate of [redacted] and at the time of his graduation that program was accredited by the AOA, which the U.S. Secretary of Education has recognized as the accrediting agency for osteopathic medical programs. On the basis of the evidence submitted, the Petitioner has established that a waiver of the requirement of a job offer, and thus of a labor certification, will be in the national interest of the United States. In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has been met.

ORDER: The initial decision of the Director, Texas Service Center, is affirmed, and the petition is approved.

Cite as *Matter of N-K-M-*, ID# 16271 (AAO Jan. 4, 2016)